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In the Supreme Court of the United States

OCTOBER TERM, 1974

EARL W. BRIAN, M.D. etc., et al., *Petitioners,* vs. CALIFORNIA WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*	NO. 74-269
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. LAURA COOPER, et al., *Respondents.*	NO. 74-311
DAVID B. SWOAP, etc., et al., *Petitioners,* vs. WILLIAM WAITS, et al., *Respondents.*	NO. 74-312

Respondents' Consolidated Brief in Opposition to Petitions for Certiorari

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PRELIMINARY STATEMENT

The principal issue in these three cases is common to and determinative of each case. Therefore, we have chosen to submit a consolidated Brief In Opposition pursuant to Rule 23(5). Respondents in all three cases have common counsel. Respondents hope that this procedure will not only enhance the Court's understanding of the issues, but will also conserve its time.

Initially, respondents discuss the common issues in Point I. Then in Point II we discuss those issues that are peculiar to one or two (but not all) of the cases. Finally, we discuss Petitioners' basic claim that the construction of state law by the Court below in each of the three cases renders the state AFDC plan out of conformity with federal law. We suggest that there is no present need for the Court to address itself to these issues and that the Court should await a determination of nonconformity by the agency principally responsible for such determinations, the U.S. Department of Health, Education and Welfare.

REASONS WHY THE WRITS SHOULD BE DENIED

I. Petitioners' "Noncash Economic Benefit" Policy Is Completely at Variance with This Court's Concept of the AFDC Flat Grant.

In the mid-1960's, HEW began encouraging the states to simplify their AFDC standards of need.[1] Until this time standards of need were computed on a highly individualized basis attempting to recognize the peculiar circumstances of each family. One result was that the need standards were exceptionally complicated and difficult to use, even for experienced caseworkers. In one sense, these individualized need standards expressed a preference for individual equity over administrative efficiency. These highly individualized systems were also criticized as placing too much discretion, and therefore, power subject to abuse, in low-level welfare workers. This tended to degrade recipients because it made them particularly vulnerable to behavior control tendencies in some social workers. *Rosado v. Wyman* (E.D.N.Y. 1969)

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1. The "standard of need" is "a yardstick for measuring who is eligible," *Rosado v. Wyman* (1970) 397 U.S. 397, 408. *See* Gladys O. White, "Simplified Methods For Determining Needs," U.S. Dept. of HEW (1964).

304 F. Supp. 1356, 1369, *rev'd*, 414 F.2d 170 (2d Cir. 1969), *rev'd*, 397 U.S. 397 (1970).

Simplification, therefore, was viewed as a means for enhancing individual dignity, *ibid*, and "as an advance in administrative efficiency." *Rosado v. Wyman* (1970) 397 U.S. 397, 417; *see further, id.*, 416-17; *id.*, O.T. 1969, No. 540, Memorandum For The United States As Amicus Curiae, 10-11. The most extreme form of simplification is one in which all the diverse elements of an individualized system are consolidated by a statistically weighted averaging. The result is a single sum applicable to all families of a given size. This is called a "flat grant maximum" system. *Rosado v. Wyman, supra*, 397 U.S. at 417.

These cases present the principal question of whether a state, after averaging the needs of all recipients under an individualized system—high need, low need and all in between—*must thereafter* continue to treat low-need families on an individualized basis. A highly simplified example will put this question in its proper perspective.

Assume that a hypothetical state had three AFDC families with four recipients in each family. Under its individualized needs system, family A's monthly needs were determined to be $200, family B's, $250, and family C's, $300. If the state converted to a flat grant system, the flat grant would be $250. Must the state then pay B and C $250 but pay A only $200 since A's needs are still only $200? That is what petitioners contend in the three instant cases.

A. IN 1971, CALIFORNIA CONVERTED FROM AN INDIVIDUALIZED AFDC PAYMENT SYSTEM TO A FLAT GRANT.[2]

To fully understand the respective contentions of the parties, a brief review of the California AFDC payment struc-

2. The most extensive exposition of the statutory background by the Court below is in *Swoap v. Cooper*, Pet., App., 5-13.

ture is necessary. Prior to 1971, families of equal size received greater or lesser grants depending upon several variable factors: (1) the age of each child; (2) the sex of each child; (3) the county of residence; (4) the number of adults (one or two) in each family; (5) the *actual* expenditures for rent (however, *actual* expenditures were recognized only up to specified maximums which varied according to the size of the family and further varied according to the county of residence); and (6) whether or not a child was unborn or in being. These factors, and the amounts applicable to each, had long been established by administrative regulations of the Director of the state welfare agency.

When a family applied for AFDC (and every month after a family was determined eligible), the pertinent factual circumstances of *each* family would be determined in order to apply each of the foregoing factors. When this review was completed, the result was called the family's "need". This system resulted in considerable variation.[3] For example, an AFDC mother residing Sacramento County with her three daughters, all of whom were under six years of age, would have total monthly needs (exclusive of housing) of $183.30. On the other hand, a mother living with three teenage sons in Sierra County would have a similar monthly needs figure of $305.05. Assuming that both paid rent equal to the applicable maximums for four-person housing in their counties ($120 and $110, respectively) total needs would be $303.30 and $415.05.

After the "needs" computation was completed, the family's income would be computed and the total subtracted

3. *Cf., Rosado v. Wyman* (E.D.N.Y. 1969) 304 F.Supp. 1356, 1365-67, *rev'd on other grounds*, 414 F.2d 170 (2d Cir. 1969), *rev'd* 397 U.S. 397 (1970).

from total "need." The difference, called "unmet need", would then be paid as an aid grant.[4] Thus, there was wide variation in aid grants to families of equal size. If each of the four-person families in the foregoing example had a monthly income of $200, the Sacramento County family would receive a grant of $103.30 while the Sierra County family would receive $215.05.

An important aspect of this system was that any attempt to reduce housing expenditures, and to reallocate the resulting savings to other needs such as food or clothing, would be futile. The move to cheaper housing would be met with a *pro tanto* decrease in grant. In each of the foregoing examples, a $25 monthly reduction in rent would reduce the grant by a full $25 (to $78.30 and $90.05, respectively).

In August, 1971, the California Legislature enacted the Welfare Reform Act of 1971. Among its many provisions, the Act "replaced this cumbersome system," *Swoap v. Cooper,* Pet., App., 5, with a flat grant system by completely rewriting the grant payment statutes, Welf. & Inst. Code §§ 11450(a) and 11452.[5] "The chief purposes . . . were to streamline the administration of the welfare program and to eliminate welfare paternalism by allowing recipients to allocate grant money according to their own priorities." *Id.,* App., 6.

> "The Legislature abolished the administrative allowances and need figures and took upon itself the tasks

4. In certain cases of high "needs" and little or no income, "unmet need" might exceed statutorily imposed maxima which varied only according to family size. In such case, "unmet need" would be paid only up to the statutory maximum.

5. The former versions are set out in *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 449, nn. 6, 8. The present grant statute, § 11450, is set out in *Swoap v. Cooper,* Pet., App., 45-47. The present needs statute, § 11452, is set out in Exhibit "1" hereto.

> of determining the minimum need level of recipients (Welf. & Inst. Code § 11452). The Legislature itself then set *uniform welfare payments* (Welf. & Inst. Code § 11450) *based on a fair averaging of all AFDC grants,* a method of welfare benefit computation recently approved by the United States Supreme Court in Rosado v. Wyman (1970) 397 U.S. 397." *Id.,* 5-6 (emphasis in original).

Unlike its predecessor, the new § 11450 no longer looked to the "needs" of any particular family in computing a grant.[6] The process became far, far simpler: the grant to *any* and *every* family would be the difference between available income and a statutorily fixed amount based *solely* on the number of eligible, needy persons in the household. The touchstone is that *all families of equal size are to be treated equally.*

The method by which the new amounts in §§ 11450(a) and 11452 were derived was simple arithmetic averaging of the varying amounts received by families of equal size under the prior method. *Swoap v. Cooper,* Pet., App., 11. True, payment of the same amounts to all families of equal size may mean that some are able to cope more easily than others. (Consider an AFDC mother with three infant children compared to another with three teenagers.) But this is simply the result of averaging. As this Court has ob-

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6. The "needs standard" statute, § 11452, uses the term, "minimum basic standards of adequate care" for "needs." The amounts applicable to families of specified size are set forth in the statute. These amounts are relevant only to *initial* eligibility. See *Rosado v. Wyman* (1970) 397 U.S. 397, 408; *Villa v. Hall* (1972) 7 Cal.3d 926, 928, *on remand from Hall v. Villa* (1972) 406 U.S. 965.

The "grant" statute, § 11450(a), specifies that "there shall be paid, notwithstanding minimum basic standards of adequate care . . . an amount of aid each month which when added to . . . income . . . is equal to the sums specified in the following table. . . ." (Emphasis added.)

served, "obviously, such averaging may affect some families adversely and benefit others." *Rosado v. Wyman, supra,* 397 U.S. at 419. Thus, as in every averaging, all those families that were receiving *more* than the average under the old system *lost* benefits while those formerly receiving *less* than the average gained thereby. *See further, Rosado v. Wyman, on remand,* (E.D. N.Y. 1970) 322 F.Supp. 1172, 1189.

B. AFTER THE CALIFORNIA LEGISLATURE ADOPTED A COMPREHENSIVE FLAT GRANT SYSTEM, PETITIONERS ADOPTED POLICIES REDUCING GRANTS TO CERTAIN FAMILIES WHO SHARED HOUSING WITH OTHER PERSONS CONTENDING THAT SUCH FAMILIES HAD LOWER NEEDS. SUCH A POLICY VIOLATES THE FUNDAMENTAL LOGICAL AND MATHEMATICAL PREMISE OF A FLAT GRANT.

Three classes of "gainers" in the aweraging process are those represented by the respondents in each of the three Petitions before the Court. After the Welfare Reform Act of 1971 became effective, petitioner SWOAP's predecessor issued a series of regulations which reduced the grants otherwise payable to these several categories of "gainers."

First, a regulation, EAS § 44-115.9, was adopted establishing "allowances" for rent, utilities, food and clothing which varied according to family size. (See *Brian v. CWRO,* Pet., App., 34-35 where the regulatiom is set out in full.) Then, three other regulations, those here at issue, were adopted which established three slightly varying schemes to utilize this basic regulation to bring about grant reductions.

1. The "Flat Grant" in Swoap v. Cooper.

The principal case of this trilogy, *Swoap v. Cooper,* involves EAS § 44-115.8. It applies when any AFDC "child resides with an adult aid recipient. . . ." *Id.,* Pet. 3. An "adult aid" recipient is defined as recipient of the benefits

of the three "adult" public assistance programs under the Social Security Act of 1935.[7] For example, an AFDC mother and her two children may share housing with the children's elderly grandmother. Assume that in such a case the total rent and utility costs were $100. The regulation then requires that the *pro rata* share of the *actual* housing and utilities costs of the AFDC unit, $75, be compared to the EAS § 44-115.9 "allowance." For an AFDC family of three, the "allowance" is $104. *Brian v. CWRO,* Pet., App., 34. Thus, the "allowance" exceeds the *pro rata* share by $29. "[I]f the allowance exceeds the [*pro rata*] share of the *actual* cost of housing and utilities (including telephone), then the excess shall be countable against the . . . maximum aid payment *as income.*" *Swoap v. Cooper,* Pet., 3-4 (emphasis added). In this example, the amount of "income" is $29. Thus, assuming no "real" income, the otherwise payable grant of $235 would be reduced to $206.

The asserted rationale for this policy is that these families do not "need" as much as families who are not sharing housing and utilities with an "adult aid" recipient. The amounts that the latter families "need" is set forth by regulation in EAS § 44-115.9; those amounts represent the average *actual* expenditures of those families for housing and utilities.[8]

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7. Old Age Assistance (OAA), title I, 42 U.S.C. §§ 301-06, Aid to the Blind (AB), title X, 42 U.S.C. § 1201-06 and Aid to the Totally and Permanently Disabled (ATPD), title XIV, 42 U.S.C. §§ 1351-55; each of these programs has been succeeded by the new combined federally administered income maintenance program for the aged, blind and disabled, the Supplemental Security Income (SSI) program, P.L. 92-603, §§ 301-03, 86 Stat. 1465-78, 42 U.S.C. §§ 1381-83c.

8. The factual derivation of EAS § 44-115.9 is discussed in *Swoap v. Cooper,* Pet., App., 24, n.2 (Burke, J., dissenting).

The basic flaw with such an approach is that it attempts to preserve the cake while at the same time strives to consume it. In short, it exacts a double penalty. An average, by definition, reflects the individualized needs of "high need" and "low need" families. Thus, after an averaging, "high need" families are penalized since they received a higher grant before the implementation of a flat grant system.

Curiously, all of the litigation over the conversion to flat grants by several states following this Court's *Rosado* decision involved challenges by "losers" in the averaging process complaining of the inclusion of "gainers" in the striking of the average. Generally, these litigants objected to the inclusion of families whose rental needs had been determined (as in California) on an "as-paid" basis and: (1) who lived in public housing and who therefore paid artificially low rents, *New Jersey Welfare Rights Organization v. Cahill* (D.N.J., 1972) 349 F.Supp. 501, 511, *aff'd*, 483 F.2d 723, 727 (3rd Cir. 1973), *Roselli v. Affleck* (D.R.I. 1974) 373 F.Supp. 36, 44-45; (2) who paid no rent at all, *Johnson v. White* (D.Conn. 1972) 353 F.Supp., 69, 78; (3) who lived in rural areas and paid lower rents in comparison to urban areas, *New Jersey Welfare Rights Organization v. Cahill, supra*, 349 F.Supp. at 511; or, (4) who shared lodging with other non-AFDC persons, *id.*, 75, 77-78, *Roselli v. Affleck, supra*, 373 F.Supp. at 46-47. In each case, the courts held that there was nothing legally improper in such a method because such a result was inherent in the nature of the statistical process. As the Third Circuit said in *New Jersey Welfare Rights Organization v. Cahill, supra*, 483 F.2d at 727:

> "The thrust of these arguments is that any averaging process is 'unfair' to many welfare recipients. While

> it is conceded that the result of averaging may reduce welfare payments to many families and increase the grants to others, [42 U.S.C.] § 602(a)(23), as interpreted by *Rosado* [397 U.S. 397] does not proscribe such a result."

Now, however, petitioners seek to enforce a double penalty by recognizing only the reduced needs of "lower need" families which have already been recognized in the establishment of the average. The Court below concluded that the imposition of this double penalty was inconsistent with the intent of the California Legislature in establishing a flat grant system:

> "In calculating the various flat grant figures included in the schedule of section 11450, the Legislature averaged the diverse needs of *all* AFDC recipients; this averaging took into account the savings accruing to some recipients because of shared housing, as well as the many factors, such as specialized housing or utility needs, which resulted in higher housing costs for other recipients." *Swoap v. Cooper,* Pet., App., 11 (emphasis in original).

Of course, there is nothing that requires a state which adopts a "flat grant" approach to include *all* needs in the averaging process or to include all variations of a particular need. For example, all needs could be averaged *except* housing, which could continue to be allowed "as paid". This would result in lower grants to those who share housing.[9] Or, the housing needs of only those families which had been living in independent living arrangements could be averaged; those in shared housing arrangements could continue to be treated individually. Petitioners contended below that this is what was done in California. However, based upon exhaustive analysis of the legislative history, the Court

9. Or for those who live in public housing, or who live in rural areas, or who have free housing.

below concluded that "there is absolutely nothing to support such a contention." *Swoap v. Cooper,* Pet., App. 11, n. 13; *see also, id.,* 8-10. The Court below therefore held that "[b]ecause the effects of shared housing have already been considered in establishing the basic grant figures . . . the challenged regulations [EAS § 44-115.8] . . . would impose an unfair 'double deduction' on AFDC recipients who happen to share a household with a recipient of adult aid." *Id.,* 11-12.

2. The "Flat Grant" In Brian v. California Welfare Rights Organization.

The circumstances of the second case in the trilogy, *Brian v. CWRO,* also involved another category of "gainers" in the averaging process, families with unborn children. Since 1949, California has defined the term, "needy child", to include an unborn child; there is no disagreement between the parties on this score.[10]

Prior to the 1971 conversion to a flat grant, the existence of an unborn child increased the family's "needs" by only a flat $21 per month. *Brian v. CWRO,* Pet., App., 4. This amount was less than would be the result if the child was in being because all of the other variable need factors (age, sex, county of residence, etc.) were inapplicable to this special situation. Therefore, after the averaging process leading to the flat grant, this class of families would tend to be "gainers". Upon conversion to the flat grant, the unborn child was treated for grant computations as equivalent to a child in being. Thus, prior to her pregnancy, respondent SHELTON, her husband and their young son, Christopher, consisted of a three person family eligible for a

10. Thus, this case does *not* present the Court with the question of whether or not 42 U.S.C. § 606(a) requires inclusion of unborn children. *Cf. Alcala v. Burns,* U.S. Sup. Ct., O.T. 1973, No. 73-1708; *Doe v. Lukhard,* U.S. Sup.Ct., O.T., 1973, No. 73-1763; *Carver v. Hooker,* U.S. Sup.Ct., O.T. 1974, No. 74-242.

three-person family grant of $235 monthly. In early April, 1972, respondent SHELTON became pregnant; her family thereafter consisted of four persons eligible for the full four-person $280 grant as if the child she was carrying was in being.

Later in May, 1972, petitioner SWOAP's predecessor implemented a policy whereby an unborn child was considered to be receiving free rent and utilities owing to its residency within its mother's womb. The full "in-kind income allowances" of EAS § 44-115.9 for these items of need for one person were computed. The total was $67.[11] This was subtracted from the four-person grant of $280 thus leaving the family with just $213, $22 *less* than the $235 the family received *before* respondent SHELTON became pregnant. In July, 1972, the policy was changed so that the "in-kind income" would equal the increment to the next higher-person grant level; in the case of the SHELTON family, that increment is $45 ($280-235). In effect, the unborn child would no longer be recognized as eligible for a grant although this result would be reached after traveling an unusual, albeit imaginative, route.

On August 10, 1972, this action was commenced as an original mandamus proceeding in the California Court of Appeal seeking that Court's discretionary assumption of jurisdiction pursuant to Art. VI, § 10 of the California Constitution. One argument asserted was that both state and federal law required inclusion of an unborn child in the family grant (the federal law arguments were similar to the arguments made by the recipients in the cases cited in n. 10 *supra*) and that the "in-kind income" notion completely thwarted the policies inherent in such requirements. Secondly, it was asserted that the "in-kind income" notion

11. This total is less than the amounts in the version of EAS § 44-115.9 set forth in *Brian v. CWRO*, Pet., App., 34, since the amounts have been updated since May, 1972.

was fundamentally at odds with the principle of a flat grant since the lower need families with unborn children under the pre-1971 scheme were in fact included in the averaging process. Six days after the action was filed, a regulation, EAS § 44-115.95, was adopted which again changed the details of computing the precise amount of "in-kind income". (It is set forth in *Brian v. CWRO,* Pet., App., 32.) Henceforth, it was determined by the incremental values expressed in the "allowances" regulation, EAS § 44-115.9, of a family equal in size to the members in being compared to a family with one or more person. (See *Brian v. CWRO,* Pet. App. 13, for an actual application of the new process in operation using the circumstances of the SHELTONs.) Because of the mathematical relation of the values in EAS § 44-115.9, the amount of the "in-kind income" in all cases would be such that a family would have a $10 grant increase whenever an AFDC mother became pregnant.

Respondents contended that this practice was completely at variance with the fundamental mathematical premise of a flat grant: some gain and some lose but all families of equal size whose individual circumstances were taken into consideration in striking the average are to receive the same grant amount. Petitioners replied with the contention that the economic benefit of the prenatal lodgings constituted "income" or "resources" which, pursuant to state and federal law *must* be subtracted from the maximum grant. Without directly addressing respondents' arguments on the nature of a flat grant, the Court below rejected petitioners' "income" or "resources" contentions as wholly unsupported by state or federal law. *Brian v. CWRO,* Pet., App., 7-8.[12]

12. The Court in its subsequent opinion in *Cooper,* which does treat the flat grant issues, recognized the flat grant issue as common to *Brian v. CWRO, Swoap v. Cooper,* Pet., App., 1, n.1. *See also, id.,* 16, n.16.

3. The "Flat Grant" in Swoap v. Waits.

Similarly, the *Waits* class of children is another group of "gainers" in the averaging process; they are children who have been orphaned or abandoned and who are not living with their parents, but are living with "non-needy caretaker relatives."

To be a "caretaker relative," one must be a person related to the child to the degree specified in § 406(a) of the Social Security Act, 42 U.S.C. § 606(a), such as a grandmother, aunt, brother, etc. To be "non-needy" the income and resources of such relatives must be in excess of the increment in the income limit applicable to a family equal in size to the children in question *plus* the non-needy caretaker relatives. For example, respondent BROWN and his wife are the caretaker relatives of their two minor nieces and nephew. The income limit applicable to the three children is $235 per month. If the BROWNs are added, the family becomes a five-person family with a grant of $331. Hence, if the BROWNs' own income exceeds $96 per month ($331 —235), they are considered to be "non-needy" and therefore are not eligible for a grant.

Prior to the 1971 conversion to the flat grant, children living with non-needy caretaker relatives had their housing needs computed on the same basis as children living with recipients of "adult aids," i.e., the *Cooper* class. That is, their housing needs were equal to their *pro rata* share of the household's total shelter costs, limited only by the maximum allowances applicable to a family of equal size. *Swoap v. Waits,* Pet., App., 5, n. 5.

For example, if four needy dependent children were living with their non-needy aunt and uncle in Sacramento County, and the total household shelter costs were $150, the children's *pro rata* share would be $100 (two-thirds of $150). This full amount would be allowed as shelter need since it would be below the limit for a four-person family.

The average needs of the class would tend to be less than those applicable to families of equivalent size living independently since the latter do not enjoy the "economies of scale" which exist when housing is shared. Thus, this class of children would tend to be "gainers" in the averaging process.

Upon conversion to the flat grant in 1971, the newly adopted regulation challenged herein, EAS § 44-115.611 (set out in *Swoap v. Waits,* Pet., App., 26), brought about substantial grant reductions to the *Waits* class of children. The reasoning underlying this regulation is as follows:

1. These children are "less needy" than other children because they receive free rent and utilities from their non-needy caretaker relatives;

2. The rent and utilities they receive are free because, as the Court below held, the regulation *"conclusively presumes* that such relatives, by agreeing to take such children into their homes, are both willing and able to provide the children with free housing and utilities." *Id.,* at 6 (emphasis in original).[13]

3. Accordingly, the full value of the housing and utility "allowances" of EAS § 44-115.9 is to be subtracted from the applicable grant maximums.[14]

This brought about substantial grant reductions. For example, respondent LUCEY's grandchild's monthly grant was reduced from $115 to $48; the three children living with

13. The conclusive nature of this presumption is treated separately below. Basically, respondents contend that it violates both a federal regulation as well as the Due Process Clause of the Fourteenth Amendment.

14. The effect was mitigated slightly if, and to the extent that, the presence of the children caused increases in the cost of housing and utilities. For example, if larger quarters had to be obtained or if the children used more water than otherwise.

respondent BROWN had their $235 grant reduced to $140; and, respondent WAIT's three grandchildren and three great-grandchildren had their $360 grant reduced to $259.

The Court below held that EAS § 44-115.6, which brought this all about, was:

> "simply another variation on the department's 'non-cash economic benefit' theme, a theme which, as explained in *Cooper*, is fundamentally incompatible with the 'flat grant' system of welfare benefits adopted by the Legislature in 1971. Thus, although the instant regulation seeks to reduce welfare payments on the basis of reduced housing and utility needs of recipients living with non-needy relatives, such reduced needs, if they in fact exist, have already been taken into account by the Legislature in computing the flat grant figures of section 11450. Consequently, if approved, the challenged regulation would in reality effect an improper 'double deduction' of welfare benefits for those recipients who happen to live with non-needy relatives." *Id.*, at 5.

C. PETITIONERS' CONTENTION THAT THE "NONCASH ECONOMIC BENEFITS" MEASURED BY THEIR REGULATIONS CONSTITUTE "INCOME" WITHIN THE MEANING OF SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT IS WHOLLY UNSUPPORTED BY THE STATUTE, ITS LEGISLATIVE HISTORY OR THE THIRTY-FIVE YEARS OF ADMINISTRATIVE PRACTICE UNDER THE STATUTE.

In each of the three cases, petitioners had one basic response to the argument that individualized treatment of classes of "gainers", after conversion to a flat grant, violated the fundamental logical and mathematical premise of such a grant system. Petitioners said that notwithstanding the California Legislature's intention that these classes of recipients receive *full* grants, the supervening will of Congress embodied in § 402(a)(7) of the Social Security

Act, 42 U.S.C. § 602(a)(7),[15] rendered the State Legislature's will nugatory.[16]

Petitioners place primary reliance upon the § 402(a)(7) phrase "income and resources". Great emphasis is placed upon the contention that *all* "income and resources" must be considered. This point we readily concede; that is not the question. The question is whether these "noncash economic benefits" were intended by Congress to be "income and resources" in 1939 when the statute was enacted. *See* Act of Aug. 10, 1939, c. 666, § 401, 53 Stat. 1379. There is a very good reason why petitioners have not cited to this Court (or to any of the courts below) pertinent legislative history, HEW regulations (or other agency policy statements), case authority or another state's practice. The reason is that none of these exist. Petitioners argue, *ex cathedra,* that these "noncash economic benefits" are "income" or "resources" (always using the terms interchangeably) when the four-decade history of the public assistance titles of the Social Security Act demonstrates only that these notions have *always* been treated, if treated at all, as aspects of a "need" determination, not as an "income" or "resource" concept.

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15. The section provides that:
"(a) A state [AFDC] plan . . . must: . . .
"(7) . . . provide that the state agency shall, in determining need, take into consideration any other income and resources of a child claiming [AFDC] . . . in determining the need of the child . . . claiming such aid. . . ."

16. Petitioners also made an alternative argument that these "noncash economic benefits" were income as a matter of *state* law. In each case, the arguments were rejected. *Swoap v. Cooper,* Pet., App., 13-17; *Swoap v. Waits,* Pet., App., 6; *Brian v. CWRO,* Pet., App. 7-8. Obviously, these interpretations of state law are not at issue before this Court. *Cramp v. Board Public Instruction* (1961) 368 U.S. 278, 281; *Henry v. Mississippi* (1965) 379 U.S. 443, 446-47.

As noted above, the touchstone of a flat grant system is that a family's grant is computed without regard to that family's *individual* needs. Since the California Legislature had withdrawn the power from petitioners to adopt regulations establishing needs, lower needs can no longer form the rationale for a lower grant. In order to circumvent this barrier, "needs" concepts were transmuted by petitioners into the concepts of "income" or "resources" by mere regulatory fiat. The Court below said in response:

> "The department's desire to cut welfare expenses at any cost has led it to disregard the clear guidelines of its legislative mandate and to construct a contrived and tortued concept of 'income' in an attempt to camouflage an impermissible administrative reevaluation of AFDC recipients' needs. An analysis of the complexities of the department's novel determination of 'income' is reminiscent of a journey into the fictional realms visited by Alice through the looking glass. In the fanciful world of Lewis Carroll, the inhabitants could turn fact into fiction and fiction into fact by mere ipse dixit. As Humpty Dumpty scornfully informed Alice, 'When I use a word, it means just what I choose it to mean—neither more nor less.' " *Swoap v. Cooper*, Pet., App., 21.

Petitioners' sole argument[17] in support of their contention that these "noncash economic benefits" are "income and resources" rests upon an analogy to § 1612(a)(2)(A) of the Social Security Act, 42 U.S.C. § 1382a(a)(2)(A).[18] That

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17. In each of their petitions, petitioners also quote out of context two sentences from this Court's recent opinion in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup. Ct. 1746, 1754. These two sentences merely state what respondents have repeatedly conceded: income must be determined *individually* and *all* income must be considered. The Court in *Shea* was not assaying the question of what is or is not income. That is the question that these cases raise.

18. In each of their Petitions, this statute is erroneously cited as 42 U.S.C. § 1382(a)(2)(A).

statute, first enacted on October 30, 1972, Public Law 92-603, § 301, 86 Stat. 1468, provides that an aged, blind or disabled recipient of Supplemental Security Income (SSI) benefits, who is "living in another person's household and *receiving* support and maintenance in-kind from such person" (emphasis added) shall be subject to a grant maximum which is one-third lower than otherwise "in lieu of including such support and maintenance in the unearned income of such individual. . . ." In other words, instead of making a determination of the actual cash value of "support and maintenance" (defined as "room and board," 20 C.F.R. § 416.1125(a), 38 Fed.Reg. 27406, Oct. 3, 1973; 39 Fed. Reg. 3674, January 24, 1974) in each case, a mechanical one-third grant reduction is made in all cases. But this rule applies only when an SSI recipient is *receiving* support and maintenance from another. It does *not* apply when an SSI recipient is *sharing* housing with another and enjoying the noncash economic benefits of economies of scale which exist when housing is shared. In that case, the recipient is *not* considered to be *receiving* anything from his or her roommate. Social Security Admin., CLAIMS MANUAL § 12237(b). It is that analogy which is most appropriate to the instant cases, an analogy wherein no "in-kind income" is considered to exist.

One important point should be made clear. Respondents have no quarrel with the notion of in-kind income. For example, a recipient who is given a TV set that has a market value of $200 receives in-kind income of $200 since the property can be converted to cash. Under the Internal Revenue Code, it is only when goods or services are received which have a fair market value that the value must be included as income. 26 C.F.R. § 1.61-2(d). An individual who saves on rent by sharing housing is not taxed on the

amount of the savings. The Court below pointed out this distinction as follows:

> "[U]nlike true 'in-kind income', the department's 'economic benefit' concept does not reflect *actual* income (commodities or cash) received by a recipient, but instead attributes 'constructive' income to a recipient who, through such economizing conduct as sharing housing, manages to spend less money monthly than the department's hypothesized average. A recipient who saves on housing costs by sharing a household with others, and who in the department's eyes thereby realizes 'noncash economic benefits,' is a far cry from a recipient who receives free housing (i.e., actual 'in-kind income income') or cash from a willing and able donor." *Swoap v. Cooper,* Pet., App., 20, n. 19 (emphasis in original).

In short, petitioners can point to absolutely nothing in federal or state law, other than the *ex cathedra ipse dixit* emanating from their regulatory pen, that *compels* California to evaluate the "noncash economic benefit" that flows from shared housing and to deduct the assigned value as income from AFDC grants.

II. Other Issues Not Common to the Three Cases.

In addition to those issues discussed above which are common to all three cases, the Court below passed upon several other issues which present federal questions. The analysis of these issues demonstrates that the rulings below do not bring California's AFDC plan into conflict with federal law but instead they bring it into conformity with that law.

These other issues only involve *Swoap v. Cooper* and *Swoap v. Waits.* First we will address an issue common to them both and then issues unique to each.

A. EVEN IF THE "NONCASH ECONOMIC BENEFITS" OF SHARED HOUSING COULD PROPERLY BE CONSIDERED "INCOME," THE REGULATION WHICH MEASURES ITS VALUE IS INVALID SINCE IT DOES NOT MEASURE THE ACTUAL VALUE; INSTEAD, IT ASSIGNS A FICTIONAL, STANDARDIZED VALUE THAT VIOLATES FEDERAL LAW.

Assuming that the "noncash economic benefit" of shared housing must be considered to be income under § 402(a)(7), EAS § 44-115.9 is invalid since it does not measure the *actual* value to the recipient in the individual case. Rather, it uses a standardized value applicable in all cases in complete disregard of the individual circumstances of each case. (It is based upon a 1970 survey; see *Swoap v. Cooper,* Pet., App., 24, n. 2.) HEW's regulations provide that "only such net income as is *actually available* for current use on a regular basis will be considered. . . ." 45 C.F.R. § 233.20(a)(3)(ii)(*c*) (emphasis added).

The Court below properly applied this rule and this Court's recognition in *Shea v. Vialpando* (1974) ..... U.S. ....., 94 Sup.Ct. 1746, 1753-54, that income must be individually determined, and held that:

> "No matter how accurately an allowance figure may reflect the *average* cost of housing and utilities for welfare recipients throughout the state, it is still an impermissible presumption as to the value of these items received by any one recipient. Only the *actual value* . . . could possibly constitute income to the recipient, and this the regulation does not measure." *Swoap v. Cooper,* Pet., App., 19 (emphasis in original); *see also, Swoap v. Waits,* Pet., App., 8-9.[19]

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19. *Cf., Barron v. Bellairs,* ..... F.2d ....., No. 74-1210 (5th Cir., June 28, 1974) which held invalid under the same rule a Georgia regulation requiring the averaging of the past six months' child support payment in lieu of the actual amount.

B. ALTHOUGH NOT PASSED UPON BY THE COURT BELOW IN SWOAP V. COOPER, THE REGULATION AT ISSUE ALSO VIOLATES 42 U.S.C. § 602(a)(24) AND THE EQUAL PROTECTION CLAUSE OF THE U.S. CONSTITUTION.

The *Cooper* regulation, EAS § 44-115.8, becomes operative only when an AFDC family is living with an SSI recipient.[20] A 1972 amendment to the AFDC title of the Social Security Act provides that:

> "if an individual is receiving benefits under subchapter XVI of this chapter [SSI], then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter [IV-A] and his income and resources shall not be counted as income and resources of a family under this subchapter." 42 U.S.C. § 602(a)(24), P.L. 92-603, § 414(a), 86 Stat. 1492.

On December 20, 1973, after the case was *sub judice* in the California Supreme Court, HEW interpreted 42 U.S.C. § 602(a)(24) to mean that "the need, income, resources and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home." (See Exhibit "2" attached hereto.) This provision, standing alone, clearly renders EAS § 44-115.8 invalid. Under this Court's longstanding *Schooner Peggy* doctrine, 42 U.S.C. § 602(a)(24) should be applied by this Court although it was not considered below. *See Bradley v. School Bd. of Richmond* (1974) ..... U.S. ....., 94 Sup. Ct. 2006, 2016-21.

EAS § 44-115.8 is also invalid under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution because it applies only when an AFDC family is

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20. The regulation uses the term "recipients of adult aids." When written, it referred to recipients of OAS, AB and APTD; the term was not changed when these programs were replaced by the federally administered SSI program. *See supra*, p. 5, n. 7.

sharing housing with one or more SSI recipients. If three AFDC children live with their mother and their elderly grandmother, and the latter receives $235 per month from SSI, then it is operative. If, however, the grandmother receives $235 (or $335, or whatever) from Social Security (Title II of the Act) or Railroad Retirement benefits, or Unemployment Insurance, earnings, etc., it does *not* apply; if the grandmother herself is an AFDC mother, it does not apply; if an AFDC family shares housing with another AFDC family, it does not apply. There is simply no conceivable rational basis for such capricious classification and it is therefore invalid. *McGowan v. Maryland* (1961) 366 U.S. 420; *United States Department of Agriculture v. Moreno* (1973) 413 U.S. 528, 538.

C. THE REGULATION AT ISSUE IN SWOAP V. WAITS CONCLUSIVELY PRESUMES THAT NON-NEEDY CARETAKER RELATIVES ARE WILLING AND ABLE TO, AND DO, PROVIDE FREE HOUSING AND UTILITIES TO THE AFDC CHILDREN RESIDING WITH THEM. IT THEREFORE VIOLATES HEW'S "ACTUALLY AVAILABLE INCOME" RULE AS WELL AS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

Critical to an understanding of this issue is the fact that non-needy caretaker relatives, as contrasted with parents, have absolutely no legal duty to support the children that accidental misfortune or parental neglect have thrust upon them. Therefore, under this Court's decisions in *King v. Smith* (1968) 392 U.S. 309 and *Lewis v. Martin* (1970) 397 U.S. 552, EAS § 44-115.6 is violative of the "actually available income" rule of the Social Security Act because it assumes a donative intent when such intent may not *in fact* be present. There must be "proof of actual contributions." 45 C.F.R. § 233.90(a); see also, 45 C.F.R. § 233.20(a)(3)(ii)(*c*) and cases cited by the Court below in *Swoap v. Waits,* Pet., App., 6-8.

Although we have no doubt as to the applicability of the foregoing federal regulatory provisions, even if the Court were to decide that they were inapplicable, EAS § 44-115.6, nevertheless violates the Fourteenth Amendment's Due Process Clause because it establishes a conclusive evidentiary presumption of donative intent with no rational connection between the fact proved (children living with relatives who have no duty to support) and the fact presumed (donation of housing and utilities). *Vlandis v. Kline* (1973) 412 U.S. 441, 452; *Heiner v. Donnan* (1932) 285 U.S. 312, 328-30; *Mobile, J. & K.C. Ry. v. Turnipseed* (1910) 219 U.S. 35, 43-44.

III. There Is No Compelling Reason Why This Court Should Preempt the U.S. Department of Health, Education and Welfare from Making an Initial Determination Whether or Not California Law, as Construed by the Court Below, Violates Supervening Federal Law.

At the outset, the Court should be fully aware of the rather bizarre posture of petitioners before the Court. They are officers of the Executive branch of California government who claim that a state statute, which they are bound to enforce as the Legislature intended, and as the Governor signed, California Constitution, Art. 5, § 7, is invalid because it breaches federal law. This attack on state law is made on their behalf by the State's Attorney General, who is also bound to defend the State Legislature's will embodied in its enacted measures. Calif. Const., Art. 5, § 21.

The claim that state welfare statutes or regulations violate federal law is ordinarily made by those adversely affected, the state's welfare recipients. The claim is that the state law *deprives* them of rights conferred by the supervening federal law. No such claim is asserted here. Rather,

state welfare officials thrust the Excalibur of federal law through the shield of a state statute in order to *deprive* recipients of the benefits which the California Legislature strove to confer upon them.

If the rulings below truly do put California's AFDC plan out of conformity with federal law, how are petitioners injured thereby? The only conceivable injury would be the threat of termination of federal funds. Title 42 U.S.C. § 604 provides that if the Secretary of HEW determines that a state plan no longer conforms to federal law, he shall cease providing federal funds to that state. See *Rosado v. Wyman* (1970) 397 U.S. 397, 430-33 (Black, J., dissenting); *Arizona Dept. of Public Welfare v. U.S. Dept. of HEW* (9th Cir. 1971) 449 F.2d 456, 460-62, *cert. den.* 405 U.S. 919 (1972); 45 C.F.R. § 213. The Secretary's decision is then reviewable by the Court of Appeals and finally by this Court. 42 U.S.C. § 1316(3), (5). No termination would occur until the review process is completed.[21] Since those contributions to California now approach $700 million annually, such a consequence is not to be looked upon lightly. However, there is absolutely no indication that HEW shares petitioners' interpretation of § 402(a)(7) or that the agency intends to initiate termination proceedings.

In *Rosado v. Wyman* (1970) 397 U.S. 397, 425-26, this Court rejected New York's suggestion that welfare recipients should not be permitted to initiate judicial proceedings challenging state laws as violative of federal welfare

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21. Actual termination cannot occur in California since the California Legislature has provided a statutory mechanism whereby any offending provision of California law is automatically amended to reach conformity when HEW issues a "formal ruling" of nonconformity. Welf. & Inst. Code § 11003; *California Welfare Rights Organization v. Carleson* (1971) 4 Cal.3d 445, 454-55.

law until HEW has passed on the question. However, the serious adverse consequences that would befall recipients, who were correct in their claims, if they were subject to the long delays inherent in such a primary jurisdiction bar are inapplicable when the claim of nonconformity is raised by state officials administering the alleged nonconforming state law. Because of the different interests in such a situation, the arguments in support of primary jurisdiction made by Mr. Justice Black in his dissent in *Rosado, supra,* 397 U.S. at 430-35, are particularly appropriate under these peculiar circumstances.

CONCLUSION

For each of the foregoing reasons we would suggest that the Court deny the Petitions for Certiorari.

Dated: October 11, 1974
San Francisco, California

Respectfully submitted,

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Attorneys for Respondents

Exhibit 1

§ 11452. Minimum basic standards of adequate care

Minimum basic standards of adequate care shall be distributed to the counties and shall be binding upon them. Such standards are hereby determined on the basis of the schedule set forth in this section, as adjusted for cost-of-living increases or decreases pursuant to Section 11453, which schedule is designed to insure:

(1) Safe, healthful housing.

(2) Minimum clothing for health and decency.

(3) Low-cost adequate food budget meeting recommended dietary allowances of the National Research Council.

(4) Utilities.

(5) Other items including household operation, education and incidentals, recreation, personal needs, and insurance.

(6) Allowance for essential medical, dental, or other remedial care to the extent not otherwise provided at public expense.

(7) Other recurring special needs.

The schedule of minimum basic standards of adequate care is as follows:

Number of Needy Persons in the Same Family	Minimum Basic Standards of Adequate Care
1	$125
2	210
3	255
4	314
5	362
6	408
7	449
8	496
9	543
10	590

plus five dollars ($5) for each additional needy person.

The department shall establish rules and regulations assuring the uniform application statewide of the provisions of this section.

(Added by Stats.1965, c. 1784, p. 4014, § 5. Amended by Stats.197 1,c. 578, p. ....., § 28.5, eff. Aug. 13, 1971.)

Exhibit 2

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

Program Instruction
APA-PI-74-8
December 20, 1973

To: State Agencies Administering Approved Public Assistance Plans

SUBJECT: Need, Income and Resources of SSI Beneficiaries not to be Considered under Title IV-A

CONTENT: Section 414 of Public Law 92-603 amends the Social Security Act by adding Section 402(a)(24), effective January 1, 1973, and provides: "(24) if an individual is receiving benefits under Title XVI, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of the benefits under this title and his income and resources shall not be counted as income and resources of a family under this title."

This provision prohibits the inclusion of an individual receiving benefits under Title XVI, for the period for which such benefits are received, as a member of the AFDC assistance unit for purposes of determining need and the amount of the assistance payment under Title IV-A. It also prohibits the counting of income and resources of a beneficiary under Title XVI

as income and resources available to an assistance unit applying for or receiving assistance under Title IV-A.

A separate and independent computation for determining need and the amount of the assistance payment is required for AFDC assistance units when there are both Title IV-A applicants or recipients, and Title XVI beneficiary(ies) present in the same home. Computations for Title IV-A cases are not to include the needs, income or resources of Title XVI beneficiaries.

Under the provisions of 402(a)(24) State plans are to specify a method for the determination of need and the amount of the assistance payment which takes into consideration only the need, income and resources of the AFDC assistance unit and which does not include the need, income and resources of persons receiving benefits under Title XVI when they are in combined households.

In applying this provision contained in 45 CFR 233.20, the need, income, resources, and amount of assistance payment should be determined as though the SSI beneficiary were not present in the home.

INQUIRIES

To: SRS Regional Commissioners.

Commissioner, Assistance Payments Administration